No. 3764

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. L. NIDAY and MOLLIE GREEN NIDAY, GEORGE A. BUELL and EFFIE ADA BUELL and A. L. GREEN,

Appellants,

vs.

JULIA GREEN GRAEF,

Appellee and Cross Appellant.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

ALFRED A. FRASER,
Solicitor for Appellants.

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STATEMENT OF THE CASE

This was an action commenced by the plaintiff in her own right and as assignee of Gratia Green Acuff and Filo F. Green against the defendants J. L. Niday and Mollie Green Niday, et al.

It is alleged in the bill of complaint that said Julia Green Greaf, Gratia Green Acuff, Mollie Green Niday,

Filo F. Green, George L. Green and J. M. Green are the children and sole heirs at law of one R. E. Green, deceased.

It is further alleged that on and prior to the 22nd day of December, 1914, and the first day of October, 1915, the said R. E. Green was the owner and in possession of said real property described in the bill of complaint; that a part of said real property was subject to a lien of two mortgages; one in the sum of $10,000.00 and the other in the sum of $1,683.85; that the defendant, J. L. Niday, was during all the times mentioned in the bill of complaint the son-in-law of said R. E. Green and acting as attorney and confidential advisor of said R. E. Green; that such confidential relation continued to the time of the death of said R. E. Green; that said R. E. Green died intestate.

The bill further charges that the defendants J. L. Niday and Mollie Green Niday, the son-in-law and daughter of said R. E. Green, entered into a conspiracy and caused the said R. E. Green to execute and deliver to said J. L. Niday a warranty deed to the property described in the bill of complaint, which said deed was procured by the undue influence of said J. L. Niday and Mollie Green Niday and without any or sufficient consideration therefor; that the reasonable value of the property was the sum of $30,000.00, subject to mortgage liens aggregating $11,683.85.

The bill of complaint further alleges that the defendant, J. L. Niday and Mollie Green Niday, conveyed the property described in the complaint to the defendants George A. Buell, Effie Ada Buell and A. L. Green,

for the sum of $30,000.00, and that the defendants Buell and Green received said conveyance with full knowledge of the claim of the plaintiff. The bill of complaint prays that these deeds be declared null and void; that the Court direct the said J. L. Niday and Mollie Green Niday, his wife, to execute and deliver to the complainant a deed of conveyance of said property and for an accounting of the rents, issues and profits. The answer of the defendants, J. L. Niday and Mollie Green Niday, consist of a denial of all of the material allegations of the complaint, except that they admit the execution and delivery of the deeds to the property by R. E. Green to said J. L. Niday and also admit that the said J. L. Niday and Mollie Green Niday have sold the premises to the defendants Buell and Green. The answer of the defendants, George A. Buell and Effie Ada Buell and A. L. Green, is to the effect that during the year 1918 said defendants purchased from J. L. Niday and Mollie Green Niday the property described in the bill of complaint, that they are innocent purchasers thereof and had no knowledge or information of any claim or demand of the plaintiff against the property.

Upon the trial of the cause it appeared that J. L. Niday, the defendant, had paid off the mortgages on said real property and had also paid up the taxes and other expenses in connection therewith. It also appeared that the complainant, Julia Green Graef in her own right as one of the heirs of R. E. Green, deceased, and as assignee of the interest of Gratia Green Acuff and Filo F. Green, two of the other heirs, was entitled

to a one-half interest in the property described in the bill of complaint if the deeds to said property to said J. L. Niday should be set aside and declared invalid. The other one-half interest in said property would go to the said defendants, Mollie G. Niday and J. L. Niday, as assignees of the two other heirs of the said R. E. Green deceased. It is admitted that the defendants, J. L. Niday and Mollie Green Niday, had sold the premises to the other defendants mentioned, George A. Buell, Effie Ada Buell and A. L. Green, for the sum of $30,000.00, part of which had been paid in cash and the balance of the purchase price being evidenced by the promissory note of the said defendants in the sum of $23,000.00, secured by a first mortgage on the premises described in the bill of complaint.

It was stipulated upon the trial of said cause that if the Court should find the issues in favor of the plaintiff that this note and mortgage received by the defendant, J. L. Niday, upon the sale of the premises should for the purposes of the decree be held in lieu of the lands. The Court, after hearing the evidence, entered an interlocutory decree in favor of the complainant against the defendants, J. L. Niday and Mollie Green Niday, adjudging that she was entitled to a one-half interest in the note and mortgage received by said J. L. Niday upon the purchase price of said property; also adjudging that there was due to the said J. L. Niday for moneys paid out by him in satisfaction of the mortgage against the premises and other expenses incurred by him a balance still unpaid of $8,626.93 and that one-half thereof, namely, $4,313.47, was charge-

able against the one-half interest to which the complainant was entitled. The Court further adjudged and decreed that upon the payment or tender by the complainant to said J. L. Niday of the sum of $4,313.47, with interest thereon, on or before the first day of March, 1921, a final decree would be entered confirming in her a one-half interest in and to said note and mortgage of $23,000.00. The complainant having tendered the said amount within the time mentioned, the Court entered a final decree in her favor, adjudging her to be entitled to a one-half interest in and to the note and mortgage aforesaid, and the defendants have appealed to this Court from said decree.

ASSIGNMENT OF ERRORS

I

Because the Court erred in not dismissing said action on account of the staleness of the claim and for the further reason that the plaintiff was guilty of such laches as not to be entitled to any relief in a Court of Equity.

II

Because the Court erred in not dismissing so much of the plaintiff's claim as is based upon the assignment to her of the interests of Filo F. Green and Gratia K. Acuff, of the subject matter of this suit on account of the staleness of such claim and laches of said Filo F. Green and Gratia Green Acuff; and the Court erred in granting any relief to said plaintiff of these assigned claims.

III

Because the Court erred in not dismissing the plaintiff's bill of complaint for the reason that there is no allegation in said bill of complaint offering on the part of the plaintiff to do equity or to place the defendants in *status quo*; and for the further reason that there was no offer made by the plaintiff upon the trial of said action offering to do equity or to place the defendants in *status quo*.

IV

Because the Court erred in not dismissing the plaintiff's bill of complaint for the reason that said bill of complaint does not set forth any reason for her delay in bringing this action.

V

Because the Court erred in not dismissing the suit, for the reason that the evidence shows that the plaintiff procured the assignments to her of the interests in the subject matter of the suit of Filo F. Green and Gratia G. Acuff, for the sole purpose of confirming jurisdiction of the Trial Court.

VI

Because the Court erred in overruling defendants' objection to the introduction in evidence of the complainant's Exhibit No. 8, which was introduced for the purpose of impeaching the witness John M. Green, called on behalf of the complainant.

VII

Because the Court erred in holding that the deed to the lands described in the complainant's complaint,

known as Greenhurst Ranch, was given to the defendant, J. L. Niday, without adequate or sufficient consideration.

VIII

Because the Court erred upon the accounting between the parties in denying to the defendant, J. L. Niday, a credit in the sum of Four Thousand ($4,000.00) Dollars, earned by him in professional services rendered said R. E. Green prior to the execution of said deed.

IX

Because the Court erred in holding in the interlocutory decree that the deed dated the 22nd day of December, 1914, and the deed dated the 1st day of October, 1915, are or were voidable at the instance of the grantor, R. E. Green or his heirs.

X

Because the Court erred in adjudging and decreeing to the complainant, Julia Green Graef, in her own right and as assignee of the interestst of Filo F. Green and Gratia K. Acuff, to be entitled to a one-half interest in and to, or the proceeds of the sale of the lands described in plaintiff's complaint.

XI

Because the Court erred in holding that the complainant is entitled to a one-half interest in and to that certain mortgage bearing date of the 14th day of December, 1918, and recorded at page 279 of Book 70, of the mortgage records of Canyon County, Idaho, said mortgage covering the property described in complainant's complaint and also in decreeing said complainant

to be entitled to a one-half interest in the note secured by said mortgage, which said note represents the balance of the purchase price of said Greenhurst Ranch.

XII

Because the Court erred in decreeing and requiring the defendant, J. L. Niday, to deposit in the Boise City National Bank an assignment in due form of a one-half interest in and to the note and mortgage above mentioned.

XIII

Because the Court erred in granting or decreeing to the complainant any relief whatsoever in this suit.

XIV

Because the Court erred in not requiring the plaintiff to pay to the defendant, J. L. Niday, the sum of $8,626.93, being the unpaid balance due to the said J. L. Niday for moneys expended by him in paying off the mortgages upon the property mentioned in the bill of complaint, and for other expenses in connection therewith, the payment of which amount was necessary to place the said defendant Niday in *statu quo* and restore to him the moneys which he had paid out for the benefit of said real property.

ARGUMENT

In this suit the complainant seeks to set aside two (2) deeds to certain real property executed and delivered by R. E. Green, the father of the plaintiff, during his lifetime, upon the ground that said deeds were procured by fraud and undue influence upon the part of

the defendants, J. L. Niday and his wife, Mollie Green Niday. The first deed was dated the 22nd day of December, 1914, and conveyed to the defendant Niday the tract of land described in paragraph eight (8) of the plaintiff's complaint and containing six (6) acres, more or less. The second deed was made, executed and delivered by said R. E. Green to the defendant, J. L. Niday, on the 1st day of October, 1915, and conveyed to him the tract of land mentioned in paragraph eight (8) of the complaint and contained two hundred six (206) acres, more or less. On the 16th day of March, 1917, the said R. E. Green, the grantor mentioned in said deeds, died. The complaint in this suit was filed March 23, 1920. That on the 14th day of December, 1918, J. L. Niday and wife conveyed by warranty deed the lands mentioned in the bill of complaint to the defendants, A. L. Green and George A. Buell, for the consideration mentioned herein of Thirty Thousand ($30,000.00) Dollars Seven Thousand ($7,000.00) Dollars of the purchase price being paid in cash and the balance of Twenty-three Thousand ($23,000.00) Dollars secured by a first mortgage upon the lands conveyed.

I

The Court erred in not dismissing said action on account of the staleness of plaintiff's claim and for the further reason that she was guilty of such laches as not to be entitled to any relief in a Court of Equity.

The deeds sought to be cancelled in this suit are dated December 22, 1914 and October 1, 1915. and the grantor therein lived until the 16th day of March, 1917. The deeds, if they were obtained by undue influence and

fraud, as alleged in the bill, they could have been set aside by the grantor at any time during his lifetime, after their execution and delivery to the defendant Niday. This being true, the statute of limitations would commence to run against any such action from the date of the respective deeds, and the statute having started to run during the lifetime of the grantor, his subsequent death would not interrupt the same.

In the case of Harris vs. McGovern, 99 U. S. 161, 25 L. ed. 317, the Supreme Court says:

> "Nor is there any valid objection to the second conclusion of law adopted by the Circuit Court, which was that the cause of action having accrued and the statute of limitations having commenced to run during the lifetime of the devisor of the plaintiffs, the running of the statute was not interrupted by his subsequent decease and the descent of the right of action to the plaintiffs, though minors at the time and under disability to sue."
>
> Also Meeks vs. Olpherto, 100 U. S. 564, 25 L. ed. 735.

In the case of Castro vs. Geil, 42 Pac. 804, the Supreme Court of California says:

> "Respondents also contend that some of them are minors, and that they are not affected by the statute of limitations. But the cross complaint shows that these minors were not heirs of appellant's grantor when the deed was made, their parents, through whom they claim, being then, and for years afterwards, in life; and subsequent disa-

bilities do not stop the running of the statute. Alvarado vs. Nordholt, 95 Cal. 116, 20 Pac. 211; McLeran vs. Benton, 73 Cal. 329, 14 Pac. 879."

See cases cited 25 Y. C. 1269.

The Statute of Limitations of the State of Idaho governing suits of this character is as follows:

Section 6611, Idaho Compiled Statutes 1919, is as follows:

"Within three years.

"An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

And Section 6617 of said Codes provides:

"An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

In the State of Idaho the Statute of Limitations applies to suits of equity as well as to actions at law.

Ames vs. Howes, 13 Ida. 756.

Stout vs. Cunningham, 196 Pac. 208.

If this action was prosecuted in the State Court there is no question but what it would have been barred by the above statutes of limitation. The first having deed been made, executed and delivered in October, 1914, and the second deed in December, 1915, and the action having been commenced March 23, 1920, a period of more than four years having elapsed from the date of the accrual of the cause of action.

It is our contention that the section of the Idaho statutes providing a limitation of three years on actions founded on fraud should be applied to this case.

In the case of Chicago T. & M. C. Ty. Co. vs. Tillington, 19 S. W., the Court says, on page 474:

> "The deed not being void it would seem to follow that the suit should not be considered as an action to recover land. Prima facie the deed conveys the title to the land and the title remains in the grantee, unless the deed is set aside for fraud or other adequate cause for avoiding the contract. We think that the primary purpose of the present suit is to cancel the deed upon the ground of fraud, and though a judgment of the land itself is asked, still, if this prayer should be granted, it would be rather as a result of the other relief, which must first be granted, than as a purpose for which the suit was brought. The land could not be recovered without first attacking directly and annulling the deed for fraud. That was the main purpose of the suit and fixes the character of the action. The action is personal and is entirely predicated upon the right to vacate the deed. We think that the general statute of limitations of four years should have been given in the charge by the Court."

In the case of Morgan vs. Morgan, 38 Pac. 1054, the Supreme Court of Washington says:

> "The action must be classed as one for relief upon the ground of fraud. The deed in question was not void, but only voidable, at most. It passed to the defendant whatever title or interest

the plaintiff had in the lands, and she must have intended it to do so, although it is insisted that she did not know that she had any interest therein which she could enforce, and was induced to believe she had none, in consequence of the representations of the defendant to that effect. This will be more noticed later in the discussion of the remaining feature of the case. The action cannot be classed as one to recover real estate, within the ten-year limitation statute, although the result might be, in case of a favorable termination of it for the plaintiff, to restore to her a portion of the lands quit-claimed to the defendant. To do this, she must have the deed which she executed set aside, and for this purpose it is necessary to show that it was fraudulently obtained from her. The alleged fraud of the defendant is the basis of the plaintiff's action. The statute allows ample time within which to bring such a suit. It requires it to be brought generally within a time when the circumstances are likely to be fresh in the minds of the parties, and are susceptible of proof—before the evidence which might consititute a defense is likely to be lost or destroyed. It is true, the time is uncertain, in consequence of the statute requiring the action to be brought within three years from the time the fraud becomes known to the plaintiff; but there must be diligence in discovering the fraud, also."

Also St. Paul D. F. Ry vs Sage 49 Fed 315

In the case of Swift vs. Smith, 79 Fed. 709, the Circuit Court of Appeals for the Eighth Circuit says:

> "Counsel for the appellant contend, however, that the execution and delivery of the administrator's deed to Brown was in law a fraud upon the appellant, because it was a breach of duty by a trustee; and from this they argue that this suit is governed by Section 2911, and is not barred, because the appellant did not discover this fraud until within three years before the commencement of the suit. But if the execution of the administrator's deed and the repudiation of the trust thereby were 'facts constituting a fraud,' within the meaning of this section, the appellant was, as we have shown, chargeable with knowledge of these facts in 1871, 22 years before she commenced this suit, and her cause of action was therefore barred by this section. The provisions of this statute bar a suit, not only after three years from actual knowledge of facts constituting the fraud, but also after three years from knowledge of facts which would put a person of ordinary prudence upon an inquiry, which, if pursued with reasonable diligence, would lead to a discovery of the facts constituting the fraud."

In the case of Ware vs. Galveston City, 146 U. S. 102, 13 Supt. Ct. Rep. 33, on page 38, the Court says:

> "Nor is there anything which takes any of the plaintiffs out of the operations of the statutes of limitations of Texas, so as to affect the question of laches. David White's widow was a femme sole

from 1841 to 1853. The plaintiff Lumpkin became of age in 1843, the plaintiff Daniel O. White in 1847, the plaintiff Clement B. White in 1850, the plaintiff Cowles in 1852, and the plaintiff Mary A. Holtzclaw in 1854. Robert J. Ware died in 1867, and his widow, since that time, has been a femme sole. The longest period of limitation for any cause of action in Texas is 10 years."

In the case of Putman vs. N. A. & S. C. J. R. R. Co., 83 U. S. 21, L. ed. 361, the Court says:

"The Court must set aside that arrangement or they cannot recover. And the burden is upon them to establish the fraud. Had their bill been framed to set aside the arrangement because of fraud, it must have been held to have been filed too late. The statute of limitations bars actions for fraud in Indiana after six years, and equity acts or refuses to act in analogy to the statute. Can a party evade the statute or escape in equity from the rule that the analogy of the statute will be followed by changing the form of his bill? We think not. We think a Court of Equity will not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a period longer than that fixed by the statute of limitations, after he had knowledge of the fraud, or after he was put upon inquiry with the means of knowledge accessible to him."

In the case of Teall vs. Schroder, 158 U. S. 172, 39 L. ed. 938, the Supreme Court in the opinion says:

"The law of the state creating the limitations,

to which particular reference was made, is found in Section 19 of the Act defining the time for commencement of civil actions, passed April 22, 1850; and in subdivision 4 of Section 338 of the Code of Civil Procedure of California; and further, it was contended that the alleged causes of complaint had become stale because of the lapse of time, according to the general principles of equity, and that the complainants had been guilty of laches in failing to attempt the enforcement of the same at the proper time, and it was insisted that so long a time had passed since the matters took place that it would be contrary to equity and good conscience for the Court to take cognizance thereof, and to require any answer to them. Section 19 of the Act of April 22, 1850, reads as follows: 'An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.' This section applies specifically to actions for equitable relief. Other Sections of the Act provided for the limitation of actions at law. Subdivision four of Section 338 of the Code of Civil Procedure is as follows: 'An action for relief on the ground of fraud or mistake must be brought within four years after the cause of action accrues; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

In the case of Moore vs. Nickey, et al, 133 Fed. 289, this Court in the opinion by Mr. Justice Gilbery says:

> "In Curtner vs. United States, 149 U. S. 676, 13 Sup. Ct. 985, 37 L. ed. 890, the Court, referring to the statute of limitations of the State of California, by which no action could be brought for the recovery of real property or the possession thereof except within five years after the cause of action accrued, held that, whether the statute be applied directly or by analogy, or the rule in equity founded upon lapse of time and staleness of claim, the delay and laches were fatal to the maintenance of the suit. On the ground of laches the bill was, we think, properly dismissed. In the Federal courts it is not necessary, in order to let in the defense that the claim is stale, that a foundation should be laid by any averment in the answer. Sullivan vs. Portland, etc. R. R. Co., 94 U. S. 806, 24 L. ed. 324."

The deeds sought to be set aside in this action were duly recorded in the records of Canyon County, State of Idaho, the first being recorded on the 19th day of February, 1916, and the second deed being recorded on the 27th day of May, 1916. The plaintiff in this action is charged with notice of the fact of the transfer of this land to the defendant Niday from the date of such record.

In the case of Swift vs. Smith, supra, the Court says:

> "The least investigation in the natural and usual place to make such an inquiry would have led unerringly to a discovery, in 1871, of all the facts

which the husband of the appellant learned of his own accord, and brought to her attention in 1891, without any inquiry on her part. She was not the victim of any actual fraud or of any concealment. All the facts on which she now relies for relief were spread upon the records of the Probate Court of Pueblo county, and upon the records of the register of deeds at Denver, in 1871, open and ready for her inspection. The natural place to inquire after property of the estate of Russell, when she knew that he had lived and died in Pueblo county, in the State of Colorado, was in the Probate Court of that county An inquiry there would have disclosed a sufficient description of these lots and their location, both in the inventory of her father's estate and in the account of the administrator, to have led to a discovery of their occupation by Brown, and of the record of the deeds of them in the register's office at Denver. Under the principle of law to which we have referred, the appellant must be charged with the knowledge, in 1871, of all the facts on which this suit is founded, because she then knew facts sufficient to put a person of ordinary prudence and sagacity upon an inquiry which would have led inevitably to a knowledge of those facts, if it had been pursued with reasonable diligence. Moreover, if the records of deeds to and from the administrator were constructive notice to all who purchased the title under them that Nye originally held this title in trust for the appellant, it is difficult to perceive why those records and

> the records of the deeds which followed them were not constructive notice to the appellant of all the facts which they disclosed."

In the case of Tilton vs. Ladd, 164 N. W. 871, the Court says:

> "Where a deed is filed prior to grantor's death all will be held to have been informed of its execution, starting limitation to run against them."

In the case of Clark vs. Van Loon, 79 N. W. 88, the Court says:

> "The plaintiff is a non-resident of the state and did not have actual notice of the fraud of defendant until April, 1892. But those facts did not prevent the running of the statute. Bishop vs. Knowles, supra. The record of the deed was notice to the world of its contents."

In addition to the knowledge which the plaintiff might have obtained by an examination of the records of deeds of Canyon County as to the transfer of this land from her father to Mr. Niday, she admits that she obtained actual knowledge of this transfer in the spring of 1918 (Tr., page 259).

But the record shows that the complainant did know that the defendant Niday owned the 212-acre tract of land mentioned in the bill of complaint on March 27, 1917. This tract of land was known by the name of Greenhurst, and in a letter written by this complainant she refers to the defendant Niday's ownership of said ranch (Tr., page 63).

The complainant in this action claims an interest in the property as assignee of all the right and title of her sister, Gratia K. Acuff, and Philo Green, her brother, and the record disclosed the fact that these two assignors knew that the defendant Niday claimed to own this property immediately after the death of the said R. E. Green. Gratia K. Acuff testified as follows:

> "I knew nothing of these things until my father's death. I first knew of the execution immediately following my father's death. My brother Jim told me."
>
> Tr., page 71.

Philo Green, the other assignor, also knew of this transaction the day after the funeral of R. E. Green.

The defendant Niday testified as follows:

> "I had a talk with Mr. Philo Green in regard to the execution of this deed made by his father and delivered to me. This conversation was, I think, the next day after Mr. Green's funeral. Gratia Acuff asked me if we could have a meeting in my office and talk over the affairs of Mr. Green."
>
> (Tr., page 145.)

This testimony was not contradicted by either Gratia Acuff or Philo Green, although both were present at the trial of this suit.

Conceding, for the sake of argument only, that the statute of limitations did not run against these heirs until after they had knowledge of the conveyance to until after the death of R. E. Green and they had

knowledge of the conveyance to the defendant Niday. As to the interest of Gratia K. Acuff and Philo Green, the statute became a bar, as they admitted they knew of this transaction immediately after the death of the said R. E. Green, and the complainant, Julia Green Graef, in her letter above referred to of March 27, 1917, having had knowledge at that time of this transaction, her cause of action, if any, would have been barred within five days, as said R. E. Green died March 16, 1917, and the bill of complaint in this action was not filed until March 23, 1920.

II

Because the Court erred in not dismissing the plaintiff's bill of complaint for the reason that said bill of complaint does not set forth any reason for her delay in bringing this action.

We desire to particularly call the Court's attention to the fact that the bill of complaint is entirely silent as to why the action was not sooner commenced. She does not set out in the bill any reason whatever for her failure to diligently prosecute the suit and we contend that in an action of this character it is absolutely essential to set forth in the bill of complaint by direct averments what obstacles, if any, there were and what reason, if any, existed for her failure to prosecute the suit at an earlier date.

In the case of Reed vs. Brun, 157 Fed. 190, the Circuit Court of Appals for the Eighth Circuit says:

> "The national Courts, sitting in equity, are not bound by the statutes of limitations of the states,

but they apply the doctrine of laches in analogy to them. If a suit discloses no extraordinary facts or circumstances, they apply the bar of laches at the expiration of the time prescribed by the statute of the state for the limitation of an action at law of like character, but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. Kelley vs. Boettcher, 29 C. C. A. 14, 21, 85 Fed. 55, 62. If the complaint invokes the exercise of the judicial discretion of the Court to permit the maintenance of his suit after the analogous statutory time has expired the burden is upon him to show that he has been guilty of no laches. He must specifically plead and prove what the impediments were to the earlier prosecution of his claim, if he was ignorant of the facts alleged in the bill, how he came to be so long without knowledge of them, the means, if any, by which the defendant concealed them, how and when he first came to know them, and such other facts and circumstances as would appeal to the conscience of a chancellor. 'And especially must there be distinct averments of the time when the fraud, mistake, and concealment, or misrepresentation, was discovered, and how discovered, and what the discovery is, so that the Court may clearly see

whether, by the exercise of ordinary diligence, the discovery might have been before made. For, if by such diligence the discovery might have been before made, the bill has no foundation on which it can stand in equity, on account of the laches'."

In the case of Hays vs. Seattle, 251 U. S. 233, 64 L. Ed. 243, the Court says:

"The only answer made to this is that the defense of laches was not pleaded. But in the equity practice of the Courts of the United States laches is a defense that need not be set up by plea or answer. It rests upon the long-established doctrine of Courts of Equity that their extraordinary relief will not be accorded to one who delays the assertion of his claim for an unreasonable length of time, especially where the delay has led to a change of conditions that would render it unjust to disturb them at his instance. It is for the complainant in his bill to excuse the delay in seeking equitable relief, where there has been such; and if it be not excused, his laches may be taken advantage of either by demurrer or upon final hearing. Maxwell vs. Kennedy, 8 How. 210, 222, 12 L. Ed. 1051, 1055; Badger vs. Badger, 2 Wall. 87, 95, 17 L. Ed. 836, 838; Marsh vs. Whitmore, 21 Wall. 178, 185, 22 L. Ed. 482, 485; Sullivan vs. Portland & K. R. Co., 94 U. S. 806, 811, 24 L. Ed. 324, 326; Mercantile Nat. Bank vs. Carpenter, 101 U. S. 567, 25 L. Ed. 815; Landsdale vs. Smith, 106 U. S. 391, 27 L. Ed. 219, 1 Sup. Ct. Rep. 350; Hammond vs. Hopkins, 143 U. S. 224, 250, 36 L. Ed. 134,

145, 12 Sup. Ct. Rep. 418; Galliher vs. Caldwell, 145 U. S. 368, 371-373, 36 L. Ed. 738-740, 12 Sup. Ct. Rep. 873; Hardt vs. Heidwever, 152 U. S. 547, 559, 38 L. Ed. 548, 552, 14 Sup. Ct. Rep. 671; Abraham vs. Ordway, 158 U. S. 416, 420, 39 L. Ed. 1036, 1039, 15 Sup. Ct. Rep. 894; Willard vs. Wood, 164 U. S. 502, 524, 41 L. Ed. 531, 540, 17 Sup. Ct. Rep. 176; Penn. Mut. L. Ins. Co. vs. Austin, 168 U. S. 685, 696-698, 42 L. Ed. 626, 630, 631, 18 Sup. Ct. Rep. 223."

In the case of Hardt vs. Heidwever, 152 U. S. 547, 38 L. Ed. 548, in the opinion the Court says:

"General allegations that there has been fraud, or mistake, or concealment, or misrepresentations, are too loose for purposes of this sort. The charges must be reasonable, definite, and certain as to time, and occasion, and subject matter. And especially must there be distinct averments of the time when the fraud, mistake, concealment, or misrepresentation was discovered, and how discovered, and what the discovery is, so that the Court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made. For, if by such diligence the discovery might have been before made, the bill has no foundation on which it can stand in equity, on account of the laches * * * But the bill does not state what particular discoveries have been obtained, or when they were obtained, or by what inquiries, or in what manner, or at what time."

"On appeal this decision was affirmed, 48 U. S. 7 How. 819 (12: 928), and in delivering the opinion of this Court, Mr. Justice Grier laid down the rule in this language:

"'And especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the Court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made'."

Similar declarations may be found in several subsequent cases: Badger vs. Badger, 69 U. S. 2 Wall. 87 (17:836) in which is found this quotation:

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill."

Godden vs. Kimmell, 99 U. S. 201, 211 (25: 431, 434); Wood vs. Carpenter, 101 U. S. 135, 140 (25: 807, 808), in which this Court said:

"A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made * * *

sooner." See also Lansdale vs. Smith, 106 U. S. 391, 394 (27: 219); Hammond vs. Hopkins, 143 U. S. 224, 251 (36:134, 145); Felix vs. Patrick, 145 U. S. 317, 332 (36:719, 722); Foster vs. Mansfield, C. & L. M. R. Co. 146 U. S. 88 (36:899); Fisher vs. Boody, I Curt. 206; Carr vs. Hilton, I Curt. 390; Moore vs. Greene, 2 Curt. 202.

"Tested by this rule, it is apparent that this bill must be held deficient in not showing how knowledge of the wrongs complained of was obtained by the plaintiffs. It is alleged that they were ignorant, and now have knowledge, and that they acquired such knowledge within a month prior to bringing the suit; but how they acquired it, and why they did not have the same means of ascertaining the facts before, is not disclosed."

In the case of Teall, et al. vs. Shaven, et al., 40 Fed. 774, the Court says:

"So, also, the means by which the complainants were so long kept ignorant of these rights by the respondents and the impediments, etc., to an earlier prosecution of their claims, are not sufficiently set out in the bill. Says the Supreme Court in Godden vs. Kimmell, 99 U. S. 211:

"'Courts of Equity, acting on their own inherent doctrine of discouraging for the peace of society antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, or where the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust.*

Relief in such cases may be sought; but the rule is that the *cestuie que trust should set forth in the bill specifically, what were the impediments to an earlier prosecution of the claim, and how he or she came to be so long ignorant of their alleged rights, and the means used by the respondent to keep him or her in ignorance, and how he or she first came to the knowledge of their rights.* Badger vs. Badger, 2 Wall. 87; White vs. Parnther, 1 Knapp 227. When a party appeals to the conscience of the chancellor in support of a claim, says Mr. Justice Field, where there has been laches in prosecuting it, or long acquiescence in the assertion of adverse right, *he should set forth in his bill specifically what were the impediments to an earlier prosecution of the claim; and if he does not, the chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer, or any formal plea of the statute of limitations contained in the answer.* Marsh vs. Whitemor, 21 Wall 185."

None of these means are set out in this bill.

The same doctrine is repeated in Richards vs. Mackall, 124 U. S. 187, 8 Sup. Ct. Rep. 437. See also Sullivan vs. Railroad Co., 94 U. S. 806-811; Brown vs. County of Buena Vista, 95 U. S. 160; Hume vs. Beale's Ex'x, 17 Wall 336; Hayward vs. Bank, 96 U. S. 611; Speidel vs. Henrici, 120 U. S. 377-387, Sup. Ct. Rep. 610.

In the case of Stout vs. Cunningham, 196 Pac. 208, the Supreme Court of Idaho says:

"In cases of this character, where fraud, concealment, and ignorance of the facts are relied upon

to suspend the running of the statute of limitations, there must have been such concealment as would prevent a person exercising due diligence from discovering the facts. What diligence was used is a question of law to be determined by the Court from the complaint. Mere conclusions of law are not sufficient to remove the bar of the statute. The particulars of the discovery must be alleged. It should be stated when the discovery was made, what it was, how it was made and why it was not made sooner. The amended complaint is silent as to how the contract was obtained, neither are there any reasons assigned why the contract was not sooner obtained. In other words, the circumstances of the discovery are not fully stated. The fact that Cunningham gave out no information of his transactions with the Main ands would not be sufficient, or the fact that the plaintiffs knew nothing of the transaction between the Mainlands and Cunningham until they procured a copy of the contract between Cunningham and the Mainlands, would likewise be insufficient to bring them within the provisions of the statute. The general rule is announced in the case of Wood vs. Carpenter, 101 U. S. 135, 25 L. Ed. 807."

III

When it is sought to set aside transactions on the ground of the confidential relations existing between the parties or by reason of undue influence and not upon the grounds of actual fraud, the Courts are more strict

and require a greater degree of diligence in the commencement and prosecution of the suit.

In the case of Hoyt vs. Latham, 143 U. S. 553, 12 Sup. Ct. 568, the Court says:

> "In cases of actual fraud, or of want of knowledge of the facts, the law is very tolerant of delay; but where the circumstances of the case negative this idea, and the transaction is sought to be impeached only by reason of the confidential relations between the parties, and the *cestuis que trustent* have ample notice of the facts, they ought not to wait and make their action in setting aside the sale dependent upon the question whether it is likely to prove a profitable speculation. As the question whether the sale should be vacated or not depends upon the facts as they existed at the time of the sale, so, in taking proceedings to avoid such sale, the plaintiff should act upon his information as to such facts, and not delay for the purpose of ascertaining whether he is likely to be benefitted by a raise in the property, since that would practically amount to throwing upon the purchaser any losses he might sustain by a fall, and denying him the benefit of a possible raise. Hammond vs. Hopkins, 12 Sup. Ct. Rep. 418."

The case last cited is peculiarly applicable to the facts in this case. The plaintiff after having knowledge of the facts, permitted the defendant to retain possession and ostensible ownership thereof, at least of the property, make improvements thereon, pay the taxes, and

after he had made advantageous sale of the property she now seeks to reap the benefit thereof.

In Willard vs. Wood, 164 U. S. 502, 17 Sup. Ct. 176, the Court said:

> "But the recognized doctrine of Courts of Equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the Court, even though the laches are not pleaded or the bill demurred to. Sullivan vs. Railroad Co., 94 U. S. 391, 1 Sup. Ct. 350; Badger vs. Badger, 2 Wall. 87."

In the case of Ward vs. Sherman, 192 U. S. 168, 48 L. Ed. 391, the Court says:

> "The property was turned over on a contract of sale. Ward was left in possession for over three years and a half without a suggestion of any claim that he was only a mortgagee in possession. He had a right to believe that he was the owner. If the contract had not been made he could have foreclosed his mortgage and acquired title by sale under foreclosure proceedings. He dealt with the property as his own. He gave his time, skill, and labor to the work of caring for it. It is impossible to replace the parties in the situation they were in at the time the contract was made. It would be grossly inequitable to deprive him of the benefit of his time, skill and labor, and give it to the mortgagor, who all those years did nothing and gave no notice of any question of the completeness of Ward's title. It seems to us that the doctrine of

laches applies with force, and that upon the pleadings the Court should have adjudged the defendant not entitled either to rescission of the contract or to hold the vendee as a mortgagee in possession."

IV

The Court erred in not dismissing the plaintiff's bill of complaint for the reason that she did not offer to do equity or to place the defendant in *status quo.*

There is no allegation in the bill of complaint alleging the willingness or the ability of the plaintiff to return to the defendant the moneys paid out by him in paying off the liens on the premises or for taxes or improvements thereon.

The deed from R. E. Green to the defendant Niday recites that the premises are subject to mortgages in the sum of $11,683.85, which the defendant Niday assumed and agreed to pay (Tr., page 149).

The defendant Niday did pay these mortgages and incurred other expenses in connection with this property. The plaintiff had knowledge of the fact that the defendant Niday had paid off these mortgages (Tr., page 150). Not only is the complaint silent upon this question of doing equity to the defendant as a condition precedent to the rescission of the deed, but the Court in its final decree did not do equity to the defendant or place the defendant in *status quo.*

The Court found that there was a balance due the defendant Niday by reason of his paying off these mortgages and other charges against the estate the sum of $8,626.93 (Tr., page 53).

The Court further adjudged that the plaintiff should tender or pay to the defendant Niday the sum of $4,313.47, just one-half of the amount which was due the said defendant.

In order to have placed the defendant in *status quo*, the Court should have decreed that the plaintiff pay to the defendant Niday the full sum of $8,626.93, wh ch said last mentioned amount should have been declared to be a lien against the securities or land, that upon a sale of the same any equity remaining should have been divided equitably between the parties.

This Court in a number of cases has announced the rule that a bill filed asking for the cancellation of a deed to real estate must show a tender back of the consideration received, or at least contain an unequivocal offer to restore the same, and an offer to credit the amount on any judgment recovered against the defendant is wholly insufficient.

In the case of Alaska & Chicago Commercial Co. vs. Solner, 123 Fed. 855, this Court says:

> "Appellant contends that in a suit of this character a tender before suit is not necessary; that an offer in the bill to make the tender is all that is required. The authorities are not uniform upon this point, but conceding, for the purposes of this opinion, that appellant's contention, as a general propostition, is correct, yet it is apparent that the offer as made in the bill is wholly insufficient. The original bill of complaint filed September 15, 1901, did not contain any averment offering to return the purchase price of the property. The first

amended bill, filed September 2, 1902, did not make a sufficient offer."

This Court has announced the same rule in the following cases:

Hill vs. Northern Pacific Ry. Co., 113 Fed. 915.
Mahr vs. Union Pacific Ry. Co., 170 Fed. 699.

In the case of Chicago Texas Land & Lumber Co. vs. Robertson et al., 169 Fed (C. C. A.) 287, the Court said:

"The bill in this case is one to cancel deeds of real estate sold to pay debts of complainant which were an admitted charge upon the lands conveyed, and is without equity, in that complainant does not even offer to restore the large sums of money paid out for its benefit in satisfaction of such admitted legal charges."

In the case of Stuart vs. Hayden et al., 72 Fed. 402, the Circuit Court of Appeals for the Eighth Circuit announces the rule in cases of this character as follows:

"If one who is induced to make a trade or sale by fraud would rescind it, he must immediately upon his discovery of the fraud, announce his intentions so to do, and return all the consideration he has received, to the end that the parties may be put in *status quo* before subsequent transactions have made such action impossible. Silence, delay, vacillation, acquiescence, or the retention and use of any of the fruits of the sale or trade that are capable of restoration, for any considerable length of time after discovery of the fraud, constitute a

complete and irrevocable ratification of the transaction. Rugan vs. Sabin, 10 U. S. App. 519, 531, 3 C. C. A. 578, 580, 53 Fed. 415, 418; Kinne vs. Webb, 12 U. S. App. 137, 144, 4 C. C. A. 170, 174, 54 Fed. 34, 38; Scheftel vs. Hays, 19 U. S. App. 220, 226, 7 C. C. A. 308, 312, 58 Fed. 457, 460; McLean vs. Clapp, 141 U. S. 429, 12 Sup. Ct. 29; Grymes vs. Sanders, 93 U. S. 55, 62. The supposed cross bill utterly fails to state a case for rescission, because it does not show that Gruetter & Joers ever returned to Stuart the $19,500.00 in cash which they received from this trade, or that they ever released Stuart from his agreement to pay the mortgage of $30,000.00 upon the property they conveyed. They could not rescind this trade, and recover back that which they gave in exchange, or any part of it, while they retained at least $49,500.00 in value that they had received from it."

In the case of Reeves vs. Corning, 51 Fed., on page 782, the Court says:

"There is another reason why this paragraph is insufficient. It does not allege that the plaintiff, prior to the bringing of the suit, returned or offered to return the patents to the defendant, and thus place him in *statu quo*, nor does it show any sufficient excuse for his failure to do so. It is well settled to justify citations, that, before an agreement can be rescinded, the plaintiff must have done all in his power, and with promptness, to place the

defendant in *statu quo*. For these reasons the paragraph must be held bad."

In the case of Brefogle vs. Walsh (7 C. C. A.) 80 Fed., on page 177, the Court of Appeals says:

"To be entitled to a cancellation or rescission of the agreements it was therefore necessary that the appellants, before bringing the suit, should themselves have offered to cancel the agreements, should have returned or offered to return to the trust company the Breyfogle notes which had been surrendered, and have repaid or offered to repay to that company, with interest, whatever sums it had paid to Voris or otherwise had expended. They could not treat such sums as an addition to their debt to the trust company, and so retain a benefit from the agreements which they sought to have rescinded."

In the case of Andrews vs. Hensler, 6 Wall. 254, the Supreme Court says:

"The rule that he who seeks to rescind a contract of sale must first offer to return the property received, and place the other party in the position he formerly occupied, so far as practicable, prevails equally at the civil and the common law. It is a rule founded in natural justice, and requires that the offer shall be made by the purchaser to his vendor upon the discovery of the defects for which the rescission is asked. The vendor may then receive back the property and be able, by proper care and attention, to preserve it, or he may have

recourse upon other parties, the remedies against whom might be lost by delay. He must be permitted to judge for himself what measures are necessary for his interest and protection and if the purchaser by delay deprives him of the opportunity of thus protecting himself, he cannot demand a rescission of the contract."

V

Courts of Equity will not decree the rescission of a deed where the complainant has not diligently prosecuted his claim and the property has greatly increased in value during the delay.

In this case every witness who testified upon the subject, including the witnesses for the complainant, stated that between the year 1915 and the year 1918 the lands in question had increased in value from 50 to 300 per cent.

George H. Moore, a witness on behalf of the complainant, testified:

> "The decided increase in the value of the land has taken place within the last two or three years. There has been a decided increase in the value of farm lands in the last two or three years. An increase of 50 to 100 per cent. (Tr., page 79.)

Crawford Moore, president of the First National Bank of Idaho, testified:

> "In my opinion, the increase in the value of lands such as the Greenhurst ranch between the year of 1915 and May, 1918, was from two to three times its value in 1914." (Tr., page 125.)

J. J. Walling, a witness for the defendant, testified:

"In my opinion, the value of such lands as Greenhurst and other irrigated lands in that vicinity doubled in value from the year 1915 to May, 1918. I know of a great many places that sold at double the value." (Tr., page 127.)

C. A. Glougie, a witness for the defendant, testified:

"The value of lands in that vicinity increased between 1915 and 1918 in value. The extent of the increase might be a little difficult question to answer. The good lands, the desirable pieces of property, have increased easily three-fold where others have not increased that much. I consider a part of Greenhurst desirable land." (Tr., p. 129.)

Scott Anderson, a witness called on behalf of the defendants, testified:

"I think lands have increased in value in that vicinity between 1915 and 1918. I would say the good productive lands have increased double."

(Tr., page 131.)

Under this state of facts, the complainant is not entitled to recover.

Patterson vs. Hewitt, 195 U. S. 309.

United States vs. Marshall Mining Co., 129 U. S. 579, 9 Sup. Ct. 343.

Johnson vs. Standard Mining Co., 148 U. S. 360, 13 Sup. Ct. Rep. 585.

In the case of Starkweather vs. Genner, 216 U. S. 524, 30 Sup. Ct. Rep. 382, the Court says:

> "At most the sale was voidable, not void, and he who would complain must seasonably elect whether he will avoid it or not. Twin Lick Oil Co. vs. Murbury, supra. Appellant did not act with that degree of promptness which equity demands. He has slumbered over the question of whether he should elect to let Jumer hold on to his purchase or require him to give the benefit of his bargain to his co-tenants. A delay of not less than four years, during which there has been a large appreciation in the value of the property, is unreasonable."

It appeared upon the trial that the complainant and her brother and sister had at some time prior to the commencement of this suit filed an action in the State Court for the purpose of setting aside these deeds, which action they subsequently and before the commencement of this suit dismissed.

The Trial Judge in his opinion upon the question of laches says:

> "It was therefore about two years after they learned of the deeds before they took action in the State Court and about three years before this suit was commenced." (Tr., page 47.)

Where the Court obtained its information as to the time of the filing of the action in the State Court we are unable to say, as the record is silent upon that question. For what reason that action was dismissed we

do not know, possibly to avoid the bar of the statute of limitations in the State Court. However, that may be, it is immaterial when the suit was filed in the State Court, when it was dismissed, or for what reason. As far as this suit is concerned the filing of such an action did not operate to affect the running of the statute of limitations or relieve the complainant from the charge of laches.

In the case of U. S. vs. Fletcher, 231 Fed., on page 330 the Court says:

> "The law is well settled that the mere institution of a suit does not relieve a person from the charge of laches and if he fail in its diligent prosecution the consequences are the same as if no action had been begun. Johnson vs. Standard Mining Co., 148 U. S. 360, 13 Sup. Ct. 585; United States vs. Des Moines Navigation Co., 142 U. S. 510, 12 Sup. Ct. 308; Patterson vs. Hewitt, 195 U. S. 309, 25 Sup. Ct. 35; Hagerman vs. Botes, 5 Colo. App. 391, 38 Pac. 1100; Willard vs. Wood, 164 U. S. 502, 17 Sup. Ct. 176. The doctrine operates not only as against the filing of a stale suit, but also against the slothful prosecution of a suit seasonably filed. Drees vs. Ealdron, 212 Fed. 93, 128 C. C. A. 609."

And in the case of Drees vs. Waldron, 212 Fed., page 97, the Circuit Court of Appeals says:

> "In holding contrary to the ruling below, that a motion to dismiss the petition should have been granted, this Court cites: Johnson vs. Standard

Mining Company, 148 U. S. 360, 13 Sup. Ct. 176, to the following effect:

"'It has been frequently held that mere institution of suit does not of itself relieve a person from the charge of laches and that if he fail in the diligent prosecution of the action the consequences are the same as though no action had been begun'."

We think upon an examination of the record in this case it will appear that even if the relation of attorney and client did exist between R. E. Green and the defendant Niday at the time of the execution of said deeds that the transaction was fair and that no advantage was taken of the grantor. The lands were encumbered by mortgage in the sum of over eleven thousand dollars, which amount the defendant assumed and agreed to pay, and which he did pay, thereby relieving the grantor from any liability therefor. There is some conflict in the evidence as to the value of the property at the time of the transaction, but the great preponderance of evidence is to the effect that it was worth not to exceed fourteen to fifteen thousand dollars. This evidence of the value is corroborated by the fact that it sold in 1918, at a time when such real property had reached its highest value, for $30,000.00, and all the evidence is to the effect that it had increased from 100 to 200 per cent in value during this period of time. If this be true, then its value in 1915 did not exceed $15,000.00. If any equity remained in this property in 1915 over and above the mortgaged indebtedness with interest and taxes, it is hardly sufficient to justify or sustain the charge of undue influence, fraud or oppression.

In addition to assuming the mortgage indebtedness on the property there was an additional consideration for this deed. For a long period of years the defendant Niday had acted as attorney and legal advisor of the said R. E. Green. He had presented no bill for his services, not had he demanded any pay therefor, nevertheless, Mr. Green, appreciating these services and being desirous of making some return therefor, he in a conversation had about that date with Mr. Niday, stated:

> "Niday, you have been transacting the business of mine and my family here practically ever since you have been here and you have never been paid anything. I would like for you to have Greenhurst if you want it. I can't pay out on it, and it is of doubtful value, even for you." (Tr., p. 109.)

The defendant Niday testified that the reasonable value of these services would be at least the sum of $4,000.00. The Trial Judge refused upon the accounting on this case to allow the defendant Niday any credit whatsoever for these services rendered. This we contend was error. Taking into consideration the value of these services of the defendant Niday we contend that at the date of these conveyances Mr. Green received the full value of the property conveyed.

Without taking up the time of the Court to review the evidence of the different witnesses upon the question of the mental capacity of R. E. Green to execute these conveyances, we do say that the plaintiff has not established such mental incapacity to an extent sufficient to justify the Court in setting aside these convey-

ances upon that ground, as the law requires that proof of such facts to be established be clear and satisfactory evidence. We particularly call the Court's attention to the case of Boardman vs. Lorentzen, 52 L. R. A. (N. S.) 476, a case in which the facts are very similar to the facts in this case. The Court in the above case announces the rule that in order to set aside conveyances on the ground of undue influence the burden is upon the plaintiff to establish that such influence was exercised, and the mental incapacity of the grantor, and the note to this case contains a very effective citation of authorities covering the questions involved in the case at bar. In the above case the Courts say:

> "The findings were based on evidence more or less conflicting, supposed to indicate these circumstances; Mr. Svenson was somewhat feeble around about this time of the transaction in question and somewhat childish, impaired in memory and much reserved in manner as compared to his habits prior thereto, particularly up to the time of the death of his wife in 1903. He had several children, and, prior to the transfer, expressed an intention to treat them equally in disposing of his property. He gave all to defendant and his wife, placing the title in defendant's name."

In the above statement or findings of the Court we believe to cover the condition of Mr. Green, as testified to by the witnesses for the plaintiff.

Again in the opinion of the Court, on page 483, it is said:

> "There is an absolute absence of any direct evi-

dence that appellant or his wife, by act or word, ever suggested to Mr. Svenson the idea of his conveying his property to them or either of them, or that they influenced him to reside with them, or that they ever interfered with his property or business affairs in any way whatsoever. On the contrary, as indicated in the statement, the direct evidence, and circumstantial as well, is to the effect that Mr. Svenson had his own way with his property up to the time of the transfer, did his own business without soliciting or taking or receiving advice from anyone, with perhaps the exception that defendant aided him somewhat at the time he sold the farm, all the transactions in respect to which are admitted to be beyond suspicion, and did not, by act or deed, show any dissatisfaction with the transfer to the defendant for the year afterwards, during which time, the evidence strongly tends to prove, he had sufficient mentality to appreciate the whole matter."

This also is the condition existing in the case at bar. There is no evidence whatsoever that Mr. Niday solicited a conveyance of this property from Mr. Green, or ever suggested to him the idea of making the conveyance to the defendant; so far as the record appears, it was the free, voluntary and unsolicited act of Mr. Green.

Further along in the same case the Wisconsin Court says:

"Such little circumstances, in such a situation, as waiting to be spoken to on neighbors calling,

especially in case of difficulty of hearing, if characterized by a prompt and intelligent response, as is quite clearly established here was the case, notwithstanding some little evidence to the contrary, weigh very light. And so with the circumstances of being a little childish—as that term is commonly used by young or middle-aged persons, in speaking of old people who have gotten into the period and condition sometimes spoken of as second childhood; that is, where one, on account of age, has lost the assertiveness and self-helpfulness of former days—so long as there is still full appreciation of surroundings and possessions, and the individuality requisite to the care of one's property and business. And so with evidence of such circumstances as occasionally forgetting names, or faces, or confusion as to just the way to return home on being absent therefrom, so long as there still remains, as in this case, up to the time of the transfer, capacity to conduct ordinary individual business, and such capacity is exercised. The fact that the deceased gave his property to the appellant, as representative of his daughter, to whom he evidently was more affectionately attached than any other of his children, instead of dividing it between all, has nothing unnatural about it, when viewed in the light of all circumstances bearing on the transaction. He had a right to do with his own what he had a mind to. His children had no rights in the matter at all, except to have him left free to act intelligently upon his own judgment and without coercion.

They were specially interested in that regard, but the right, in general, was no greater to them than to society at large. There is the high place, in contemplation of the fundmental principles of civil life, which the right of individual liberty to dispose of one's property by contract or will holds. It is not the business of Courts to undo what an old person may have done with his property, because of judicial notions of propriety or moral obligation in a case of this sort, or the wishes of relatives, however deserving. Did the man do freely what he wanted to do and was competent to decide upon? Those are the sole questions. They being answered in the affirmative, it ends the matter, whether the disposition be such as would seem to have been the best from a business or moral standpoint or not."

And again this Court says:

"Thus it is to be seen, in a case of this sort, upon a prima facie case being circumstantially made, calling upon the person charged with fraud to explain his conduct, there still stands the presumption against wrong-doing, eclipsed for the time being by the adversary presumption, but subject to be efficiently aroused by affirmative evidence, direct or circumstantial, so satisfactorily explaining the adversary circumstances that they no longer seem to exist by clear and satisfactory evidence. In the end, upon the whole case, the circumstances from which the alleged undue influence is inferrable, as matter of law must stand upon

such evidence. That is, the burden being upon the one charging undue influence, from first to last, to establish it by clear and satisfactory evidence, the rule goes to the existence of the circumstances; the effect of the circumstances is matter of law. Weaken the case as to any one of the vital major incidents so that it can no longer be said to exist by clear and satisfactory evidence, then the prima facie case once created is so far rebutted that the plaintiff cannot successfully stand thereon, but must go further."

Ball vs. Boston, 153 Wis. 27, 37, 141 N.W. 8, 12.

Under the facts and circumstances of this case we can find nothing unnatural or unreasonable in the transaction. It appears from the uncontradicted evidence that R. E. Green, just a short time before the deeds were given to the defendant Niday, he had nade conveyance of all his other real property to the different creditors in satisfaction of the amount of the liens against the property. The testimony shows that the other lands conveyed were of as great a value if not greater per acre than Greenhurst. That the encumbrances against them and for which the conveyances were executed were not as great in proportion as that existing against the Greenhurst ranch. It seems to us from the evidence in this case that the only thing for Mr. Green to do was to deed this property to Mr. Niday. as he did, or turn it over to Mr. Dewey in satisfaction of the mortgage indebtedness. It also clearly appears from the evidence that the mortgage to Mr. Dewey upon Greenhurst ranch amounted to more than $12,000

with the interest, and would become due and payable in about four month's time. In order to save this property for himself or his heirs, it was necessary for Mr. Green to do one of two things, either procure a person who would advance him upon the security of Greenhurst a sufficient amount of money to pay off the Dewey mortgage. This we claim was impossible, as the testimony of Mr. Crawford Moore was to the effect that persons loaning money upon real estate would not advance to exceed 50 per cent of the value thereof. Under this state of facts, the Court would have to find that in 1915 this ranch was worth the sum of $25,000, and I do not believe that such value has been established by the evidence in the case.

The second method would be by a sale of the property by Mr. Green for a sum greater than the encumbrances against it. This method we also claim was not available for Mr. Green, as the testimony of Mr. Walling was to the effect that there were practically no sales of real estate in that vicinity at that period of time, except sale under foreclosure. So far as the situation appeared at that time, probably Mr. Green did the only thing he could do with his property in an effort to keep it within the family or allow the family to procure equity there might be in it; so far as the evidence shows, his son-in-law, Niday, was the only member connected with his family who had financial ability to save this property from forclosure and sale.

If the Court should find that at the time of the transaction complained of the relationship of attorney and client existed between Mr. Niday and Mr. Green,

yet we contend that there is nothing in the evidence which would justify the Court in setting aside the transaction. Transactions between attorney and client are not prohibited. All that is required is good faith upon the part of the attorney, and by that reason of his relationship to the client, or his possession of some knowledge or of some facts which would affect the value of the property, which was not possessed or known to the client and by reason thereof he obtained the property of his client for less than its value. In this case there is no evidence that Mr. Niday was better qualified to determine the value of Greenhurst than Mr. Green himself. There was no evidence that he took advantage of his situation as an attorney to procure the transfer of this property to him. There is no evidence that he induced, persuaded, or even solicited the conveyance of this property to himself. Further more we contend that the law does not prohibit all transactions between attorney and client. The rule only applies where the attorney seeks to purchase the subject matter of the litigation or the property which the client has consulted him about professionally. In this case there is no evidence that the relationship of attorney and client existed between Mr. Niday and Mr. Green involving in any way the property known as the Greenhurst ranch.

The rule on this question is stated in Thornton on Attorneys, Sec. 154, as follows:

> "Transactions between attorney and client are not necessarily invalid, and where it appears that no advantage was taken of the client, that his consent to the transaction was not procured by con-

cealment of the facts or any other improper means, that he was fully advised and knew the effect and consequence of his act, the transaction will be upheld."

And section 158 in Thornton on Attorneys is as follows:

"It is the policy of the law to especially scrutinize gifts, conveyances, and securities given by a client to his attorney pending the relation when connected with the subject matter of litigation and it will not permit the relation and confidence it implies to be turned to the profit of the attorney at the expense of the client, but an assignment or conveyance even of the subject matter of the litigation is not necessarily void."

Also in Section 153, Thornton on Attorneys, is as follows:

"The rule that an attorney who contracts with his client must show that no advantage was taken of the situation applies, of course, only where the relation of attorney and client exists. No presumption of fraud arises because one of the parties to a transaction is an attorney until it is shown that the other is his client. The fact that one of the parties to a contract is an attorney and that he offers to and does draw writing without charge does not impose upon such attorney the duties and obligations of the professional relationship or raise a presumption of fraud or justify a finding of undue influence against him. It must be shown that the

attorney had been consulted in regard to the particular transaction or that he was in a position to take an unfair advantage of the client."

The rule governing cases of this kind is stated in Kidd vs. Williams, 56 L. R. A. 879. In this case the Court says:

"The principle in all our cases is, that while the confidential relation lasts, and as to its subject-matter, there must be no abuse of confidence with respect to it, by which the attorney secures an unjust advantage over the client. It is easy to see that in such time, and as to the business in which he is employed, the attorney could make unfair and unconscionable demands to which the client would yield, although he regarded them unjust, out of the fear of the consequences of a refusal or from the attorney's undue influence over him; but, when the business is over and the client, being *sui juris*, and fully informed as to the business transaction, and is on equal terms and dealing at arm's length with the attorney, voluntarily stipulates with him for compensation for his services which have been rendered, we are not aware of any principle on which such settlement can be properly set aside by the client, on the ground that he did not have competent and independent advice in making such settlement. Such a settlement could be set aside alone on the ground that there had been 'some intermixture of deceit, imposition, over-reaching, unconscionable advantage, or other mark of direct

and positive fraud.' 1 Story, Eq. Jur. 307; 2 Pom. Eq. Jur. 960.

"The rule, even when the relation exists, is well expressed, sustained apparently by numerous cases, in 3 Am. & Eng. Enc. Law, 2d ed., p. 334, as follows: 'An attorney is under no actual incapacity, however, to deal with or purchase from his client, all that can be required is, that there shall be no abuse of the confidence reposed in him, no imposition or undue influence practiced, not any unconscionable advantage taken by him of his client. As has been stated, in a transaction of this character, the burden is upon the attorney to show its perfect fairness; but if the Court is satisfied that the party sustaining the relation of the client performed the act or entered into the transaction voluntarily, deliberately, and advisedly, knowing its nature and effect, and that no concealment or undue means were used to secure his consent to what was done, the transaction will be upheld.' If the client is competent and capable, and with full knowledge of the transaction he proposes to settle with his attorney, acts deliberately, and voluntarily settles his account for services with his attorney, there would seem to be no indispensable necessity for independent advice on the subject. This would certainly be true, when shown that there had been no fraud, deceit, or unconscionable advantage practised by the attorney on the client, which would rebut the presumption of a violation of confidence reposed, as much so as independent advice would

do. All that is necessary is for the client to be placed in such a position as would enable him to 'form an entirely free and unfettered judgment, independent altogether of any sort of control'. If this does not appear, it would be necessary to show that the client had independent advice, in order to remove the presumption of unfairness. But when this presumption is otherwise removed, a rule that would, in addition, require independent advice would seem to be arbitrary and unnecessary. 'It is only when confidence is abused that Courts of conscience interfere', and this essential fact is nuch cases may be shown by any competent evidence. Independent advice is simply a means of proof to establish the fairness of the settlement, and that it was voluntarily entered into free from undue influence. This is made clear under the decisions of this Court. Moses Bros. vs. Noble, 86 Ala. 408, 5 So. 181; Noble vs. Moses, 81 Ala. 530, 60 Am. Rep. 175, 1 So. 217."

For the reasons herein set forth we respectfully submit that the decree of the Court be reversed and the bill dismissed.

Respectfully submitted,

ALFRED A. FRASER,
Solicitor for Defendants.